

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

**DISTRICT JUDGE GERALD BRUCE LEE
MAGISTRATE JUDGE JOHN F. ANDERSON**

MICROSOFT CORPORATION	:	
	:	
<i>Plaintiff,</i>	:	
	:	CASE NO. 1:08cv00596-GBL-JFA
v.	:	
	:	
L & Y ELECTRONICS, INC.,	:	
	:	
JOHN A. LINTON, and	:	
	:	
SANGSOON LINTON	:	
	:	
<i>Defendants.</i>	:	

AFFIDAVIT OF JOHN A. LINTON

I, John A. Linton, am over the age of eighteen (18), am competent to testify and have personal knowledge of the matters described in this Affidavit.

1. I am an officer and a shareholder of L & Y ELECTRONICS, INC. ("L&Y"). My role at L&Y includes devising and implementing policies for corporate purchasing and marketing efforts. I have over 30 years experience in assembling and marketing personal computer systems.

2. L&Y is a corporation organized under the laws of the Commonwealth of Virginia. We pride ourselves in offering computer systems that incorporate only legitimate and properly procured components, including software components.

3. During the course of its retail operations, L&Y established a valuable and continuing business relationship with D&H Distributing Co., 909 Katie Court, Harrisburg, Pennsylvania 17109 ("D&H"). Upon information and belief, D&H is an authorized

distributor of Microsoft Corporation (“Microsoft”) products. As an authorized distributor, D&H served as L&Y’s primary source for Microsoft software products.

4. IET-PA Inc., 114 E Baltimore Avenue, Unit 1, Lansdowne, Pennsylvania 19050 (“IET-PA”) contacted L&Y for the purpose of obtaining L&Y’s business as a reseller of software and hardware products. IET-PA represented to L&Y that it was an authorized distributor of Microsoft products. IET-PA offered enhanced customer service and slightly lower prices. For example, IET-PA would typically deliver products on the same or the next day, while D&H delivered products within three days to over two weeks. The faster delivery time of IET-PA was particularly desirable to L&Y’s business operations. Other than the quick turn around time for orders, there was virtually no price difference between the two suppliers.

5. Microsoft recognized L&Y as an authorized Microsoft OEM System Builder. Microsoft provided L&Y with a sign to advertise its status as such (See attached Microsoft OEM System Builder sign). As part of maintaining its authorized status, L&Y has submitted its business practices, including quality assurance to review and control by Microsoft. L&Y does its utmost to comply with requests from Microsoft, including the Microsoft OEM System Builder License (See attached MICROSOFT OEM SYSTEM BUILDER LICENSE).

6. The software L&Y sells as an OEM System Builder is sold to the customer under the END-USER LICENSE AGREEMENT. This is a requirement of L&Y’s continued status as an OEM System Builder (See attached END-USER LICENSE AGREEMENT).

7. Despite its best marketing efforts, L&Y receives minimal profit from computer system building/manufacturing activities. To date, Microsoft has failed to provide L&Y with any joint marketing or other assistance to improve profitability for Microsoft system building. Authorized system builders, like L&Y are required to comply with Microsoft directives while at the same time bear the burden of marketing and establishing a profitable business model.

Further, Microsoft has diminished the profitability of independent system builders like L&Y by providing product discounts and marketing to retail outlets including Wal-Mart, Best Buy, Circuit City along with "OEM" system builders such as Dell Computers and Hewlett-Packard.

8. In order to remain a viable business entity, L&Y adapted to market conditions by re-selling used computers and sourcing new computer systems from Dell Computers.

9. One of the primary reasons L&Y is unable to compete in manufacturing new custom computers is the pricing and marketing policies of Microsoft Corporation. For example, the cost to L&Y for Microsoft Windows XP operating system is \$133.00. The cost to computer manufacturers such as Dell Computers for Windows XP is believed to be \$25.00 or less. With Microsoft's cost of manufacturing on the order of \$25.00 or less, it appears to me that Microsoft is not offering equivalent pricing to smaller manufacturers. This has the effect of preventing small manufacturers from obtaining Windows XP for a cost within \$25.00 of what Dell Computers is paying.

10. Microsoft's pricing has caused L&Y to lose the ability to provide new manufactured computers at competitive prices. As a result of Microsoft's pricing, L&Y sustains losses of approximately \$90.00 in profits on each computer it sells. Since January 1, 2008, L&Y has only been able to sell 3 manufactured computers (2 of these 3 were sold to Reid O'Neil). The rest were used or resold from Dell Computer and other OEM manufacturers.

11. I estimate that Microsoft's pricing has cost L&Y on the order of \$10,000 per year in profits for at least the last 5 years.

12. In August 2007, L&Y received letters from Microsoft requesting that L&Y adopt certain business practices. I personally requested from Microsoft representatives a clarification as to the specific events that prompted the letters. I wanted to identify the root cause of any problems so that L&Y could take appropriate remedial measures.

13. In November 2007, I met with Microsoft personnel (Mr. Mike Fuller and Ms. Jean Agnew) regarding the procurement of Microsoft products. Mr. Fuller and Ms. Agnew received a complete tour of the L&Y facility along with an opportunity to inspect policies regarding the resale and tracking of used computer systems and software (See attached policy for used computers and log of how used computer sales are tracked). During the meeting, Mr. Fuller informed me that IET-PA was not an authorized distributor of Microsoft products and that future orders should be directed to other authorized Microsoft distributors. Acting upon Mr. Fuller's request, L&Y immediately sent future orders for Microsoft products to D&H or OEM computer manufacturers when software was for use in the manufacturer's product.

14. I am rarely afforded an opportunity to meet with a Microsoft representative. Prior to the November 2007 meeting with Mr. Fuller and Ms. Agnew, I wished to discuss Microsoft's requests of July 2007. Despite my follow up questions to Mr. Fuller in this regard, I was not provided with comprehensive responses. Mr. Fuller indicated he did not know the details concerning the letters sent to L&Y and offered no advice as to what business practices L&Y should adopt and/or revise. Mr. Fuller did not revoke L&Y's status as an authorized Microsoft OEM System Builder. Mr. Fuller's only requests were that L&Y cease procuring Microsoft products from IET-PA and to ensure that the Microsoft software CD was provided to the customer when Microsoft software was included in a system. L&Y implemented both of these directives immediately.

15. Also during this meeting, I sought guidance from Mr. Fuller about avoiding counterfeit software. Mr. Fuller told me that Microsoft was addressing the issue of piracy in

the newer software (Windows Vista and Office 2007). Mr. Fuller also said that he was aware of counterfeit versions of Office 2003 software in the marketplace and that many of these counterfeits were so good you could not distinguish them from genuine Microsoft software. Mr. Fuller further stated that in such circumstances, the best you could do was to run the Microsoft activation and verification process (see www.howtotell.com) and purchase from authorized Microsoft representatives.

16. It is known in the personal computer industry that Microsoft abandoned its Office Professional Edition 2003 ("Office Pro 2003") products when it began manufacturing and supplying its Office 2007 and later products. Upon information and belief, this occurred in approximately November 2006. Further, Microsoft stopped manufacturing and supplying its Office Pro 2003 products about that time. In effect Microsoft removed from public access and secreted the copyrighted works contained in Office Pro 2003.

17. As of April 2008, Microsoft had fully abandoned and secreted its Office Pro 2003 products.

18. Upon information and belief, D&H stopped providing Office Pro 2003 products in spring 2007.

19. As part of its resale program L&Y resells used software that it purchases from customers trading in their old computer systems.

20. L&Y takes reasonable steps to insure that the new and used software it sells are genuine and not counterfeit. As part of this process, L&Y installs and activates software when it is sold as part of a custom manufactured computer system. Microsoft software is only installed if it has been acquired with Microsoft certifications and indicia of authenticity. In addition, when Office Pro 2003 is installed, L&Y runs the software through Microsoft's activation and validation process through which only genuine software with a valid Microsoft